



**OPINION NO. 12-01  
(April 2012)**

**SUMMARY**

A law firm may list, on firm letterhead and in other communications, lawyers who are not employed by the firm but are “of counsel” to the firm. To avoid being misleading, however, the firm letterhead and other communications must conspicuously identify the “of counsel” lawyers’ status as well as any other limitations on their relationship with the law firm.

**FACTS**

A local law firm shares physical office space with several lawyers who use the space and work on cases with the firm. These lawyers are not employees of the firm, and the firm refers to these lawyers as being “of counsel.” The questions presented below center on the permissibility of the firm’s listing of the “of counsel” lawyers on letterhead, advertisements, and other listings.

**QUESTIONS PRESENTED**

1. May a law firm list lawyers who are not employed by the firm, but are “of counsel” to the firm, on firm letterhead, advertisements, and other listings?
2. Must lawyers who are considered “of counsel” be identified as such on firm letterhead?

**APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT (“ER \_\_”)**

**ER 7.1      Communications Concerning a Lawyer’s Services**

A lawyer shall not make or knowingly permit to be made on the lawyer’s behalf a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

**ER 7.5      Firm Names and Letterheads**

**Formal opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. This opinion is based on the Ethical Rules in effect on the date the opinion was published. If the rule changes, a different conclusion may be appropriate.**

**© State Bar of Arizona 2012**

- (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates ER 7.1. A trade name may not be used by a lawyer in private practice.
- (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
- ...
- (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

## RELEVANT ARIZONA ETHICS OPINIONS

Ariz. Ethics Ops. 87-24, 90-03, 91-11, 00-08, 02-07

## OPINION

- 1. A law firm may list lawyers who are not employed by the firm, but are “of counsel” to the firm on firm letterhead, advertisements, and other listings.**

It is well established that both the ABA Model Rules and Arizona’s Ethical Rules permit the use of an “of counsel” status and designation between lawyers or law firms that share a “close, regular, [and] personal relationship.” *See* ABA Formal Op. 90-357 (May 10, 1990). The term “of counsel” has evolved in its usage over time, and now commonly refers to several different types of relationships. ABA Op. 90-357 discussed usages of the “of counsel” designation, and found four common circumstances. First, the term has been applied to part-time practitioners who practice in association with a firm, but “on a basis different from that of the mainstream lawyers of the firm.” *Id.* This type of practitioner is generally a lawyer not directly employed by the firm in a traditional employee/employer relationship. The second common usage of the “of counsel” designation involves a retired partner who remains associated with the firm and is available for occasional consultation or assistance. The third category of “of counsel” lawyer is a probationary partner-to-be that is usually brought into the firm with the expectation of becoming a partner in the near future. And finally, the fourth category of “of counsel” lawyer is a lawyer in a permanent status between those of a partner and an associate. *Id.*; *see also* Ariz. Ethics Op. 00-08 (Oct. 2000) (firm may list attorneys not admitted in Arizona as being “of counsel,” with certain other disclosures required).

In these common usages of the term “of counsel,” categories one and two may involve non-employees of the law firm, while the lawyers in categories three and four are actual employees of the firm. There is no question that employed, practicing lawyers of a firm may be listed as “of counsel” on a firm’s letterhead and accordingly, this opinion does not address categories three and four. Rather, this opinion is limited to issues presented by the designation of lawyers as “of counsel” that are not firm partners (or the functional equivalent) or employees, falling into categories one and two as described above.

ABA Op. 90-357 described an “of counsel” relationship as a “close, regular, personal relationship” that is neither like that held by a partner nor that held by an associate employed by the firm. Arizona concurred in this assessment when it permitted the designation of out-of-state lawyers as “of counsel” in Ethics Op. 00-08 and allowed for the designation of law firms as “of counsel” to other law firms in Ethics Op. 87-24 (Nov. 17, 1987). *See also* ER 7.5 cmt. [3] (“Of counsel designation may be used to state or imply a relationship between lawyers only if the relationship is close, personal, continuous, and regular”). As explained in prior ABA and Arizona opinions, the relationship must be continuing and frequent and must be more than a relationship involving only an individual case, a relationship of a forwarder or receiver of legal business, a relationship involving only occasional collaborative efforts or the relationship of an outside consultant. *See* ABA Op. 90-357; Ariz. Ethics Op. 87-24. Although not directly at issue in this opinion, it bears noting that an “of counsel” designation raises confidentiality and conflicts of interest considerations that must be considered when a firm holds out another lawyer or law firm as being “of counsel.”<sup>1</sup>

In the inquiry at hand, the local law firm shares physical office space with several lawyers who use the space and work on cases with the firm. Assuming that the relationship is close and regular enough to constitute an “of counsel” relationship under the authorities discussed above, we now turn to whether the law firm may list these lawyers on their letterhead, advertising, and other materials. ER 7.5 governs firm names and letterheads, and permits lawyers to state or imply that they practice in a partnership or other organization only when that is the fact. Ariz.R.Sup.Ct. Rule 42, ER 7.5(d). Comment 2 to ER 7.5(d) indicates that lawyers sharing office facilities, but who are not in fact associated with each other in a law firm may not denominate themselves as, for example, “Smith and Jones,” as that title would suggest they practice together in a firm. As indicated by Ariz. Ethics Op. 87-24 and ABA Op. 90-357, however, “of counsel” lawyers are considered to be associated with the firm in question for purposes of ER 1.10. Furthermore, Comment 3 to ER 7.5 indicates that an “of counsel” designation may be used to state or imply a relationship between lawyers if the relationship is “close, personal, continuous and regular.”

As indicated above, Arizona has permitted the designation of lawyers as being “of counsel” in Ethics Op. 87-24 and Ethics Op. 00-08. These opinions recognize that the associating firm may communicate the “of counsel” designation on letterhead or other firm materials so long as the limitations of the relationship are adequately conveyed. *See, e.g.* Ariz. Ethics Op. 00-08 (firm designating out-of-state lawyers as “of counsel” “should affirmatively disclose that the out-of-state lawyers are only admitted to practice law in specified states... and that their practice in Arizona will be limited to federal law matters”).

## **2. “Of counsel” lawyers listed on firm letterhead, advertisements, and other listings must be clearly identified as being “of counsel.”**

---

<sup>1</sup> ABA Op. 90-357 cautioned that “of counsel” designation means a lawyer is “associated” with a firm for conflicts purposes under Model Rule 1.10, while Ariz. Ethics Op. 87-24 noted that firms contemplating an ‘of counsel’ arrangement should consider the practical problems of assuring that conflict and confidentiality, as well as other ethical rules . . . are not violated.”

The second question presented is whether, assuming the requisite relationship exists, the firm *must* expressly identify the lawyers as being “of counsel” when using their names in firm letterhead or other materials. Prior Arizona ethics opinions addressing “of counsel” status stress that whatever designation is used, it must be sufficiently detailed to properly notify the consumer of the nature of the relationship and must refrain from being false or misleading. At its core, the question boils down to whether listing the lawyers without indicating their “of counsel” nature would be likely to mislead legal consumers concerning those lawyers’ role with the law firm. Ariz. Ethics Op. 87-24 addressed misleading labeling of lawyers or firms, concluding that the use of words describing a relationship (such as “of counsel”) had to be consistent with the actual relationship and, to avoid being misleading, the relationship would need to comport with the plain meaning which persons receiving the communication would normally ascribe to those words. A listing of lawyers employed by the firm as partners or associates interspersed with lawyers who are not so employed, but have “of counsel” status, could lead a reasonable legal consumer to assume that those “of counsel” lawyers are actually partners or employees of the law firm when, in reality, they are not.

It is clear from the language of Ethics Ops. 87-24 and 00-08 that they both assumed “of counsel” lawyers would be clearly identified as being “of counsel” in the listing. Opinion 87-24 expanded that analysis, requiring that further language be used when the relationship was limited to one area of practice or to certain members of a firm. This Committee agrees with that assessment. Presenting a list of lawyers that includes non-employed “of counsel” lawyers, without further clarification, could be reasonably interpreted by legal consumers to mean that the “of counsel” lawyers are also firm partners or employees. Therefore, to avoid misleading legal consumers as to the true nature of the association, ERs 7.5 and 7.1 would require lawyers or law firms that are “of counsel” to the law firm making the communication to be conspicuously identified as being “of counsel.” If there are further limitations to the relationship, such as being limited to only one area of practice, then such limitations should also be conspicuously communicated in the listing.

## CONCLUSIONS

1. A law firm may list lawyers who are not employed by the firm, but are “of counsel” to the firm, on firm letterhead, advertisements, and other listings.
2. When such “of counsel” lawyers are listed on firm letterhead, advertisement or other listings, they must be identified as being “of counsel” in those listings.